

October 25, 1973

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Honorable Frank Church
Co-Chairman, Special Committee
on the Termination of the
National Emergency
United States Senate
Washington, D. C. 20510

Honorable Charles McC Mathias, Jr.
Co-Chairman, Special Committee
on the Termination of the
National Emergency
United States Senate
Washington, D. C. 20510

Dear Messrs. Co-Chairmen:

This is in response to your joint letter to the Director of the Office of Management and Budget, concerning the study which your Committee has undertaken. Because your inquiry involves legal authorities and issues, the Director has asked me to respond to your letter.

This Office directly administers no provisions of law that are dependent on the existence of a National Emergency or a state of war. As you have requested each of the departments and a number of agencies to respond to your inquiry, it would appear preferable to have them evaluate and make recommendations concerning the provisions of laws that they administer or rely upon in carrying out essential governmental functions.

However, there are some basic problems with the apparent scope of the study which your Committee is undertaking that trouble us. It has been our understanding that your Committee was established to study those statutory provisions that are effective during a National Emergency proclaimed by the President with the purpose of determining whether any of those provisions should be repealed or placed under closer Congressional scrutiny.

It now appears from the Committee Print of Emergency Powers Statutes that the Committee intends to study not only those statutory powers that are effective during a National Emergency proclaimed by the President, but also those that are available during a National Emergency proclaimed by the Congress or during a period of war.

In fact, the Committee Print even lists statutes that are totally unrelated to the existence of a National Emergency or war, but which are designed to permit the President to deal with specific emergencies arising out of domestic situations. For example, it lists sections 331, 332, 333, and 334 of Title 10 of the United States Code (page 20). These are the provisions that permit the President to federalize the National Guard and to use it and portions of the regular military services to suppress insurrections, domestic violence, unlawful combinations, and assemblages, as well as rebellions against the authority of the United States which cannot be controlled by the ordinary course of judicial proceedings.

These provisions date back to the founding of the Nation and were used by President Washington to raise troops to suppress the Whiskey Rebellion. They provide the authority that was used by Presidents Eisenhower, Kennedy, and Johnson to enforce court orders involving the desegregation of schools and civil rights, and by President Johnson to respond to riots in Washington, Baltimore, and Detroit. Certainly, the powers conferred by these sections can not reasonably be equated with powers available to the President by virtue of a National Emergency proclaimed by the President. We strongly recommend against any changes in these provisions.

Another example is Section 206 of the Labor-Management Relations Act, 1947 (29 U.S.C. 176), which is listed on page 286 of the Committee Print. This section authorizes the President to create boards of inquiry as a condition precedent to seeking so-called Taft-Hartley injunctions to provide cooling-off periods in labor disputes imperiling the National health or safety. We certainly question whether provisions of that nature should be included as a part of an overall national emergency study.

We believe it would be more desirable for the Committee to limit its study at this time to those statutory provisions that the President can effectuate on his own initiative by proclaiming a National Emergency. There are in excess of two hundred and eighty such provisions, making such a review in itself a significant undertaking without the inclusion of other types of provisions. The declared and ostensible purpose of this study was to assure reasonable limitations with respect to statutory powers that the President can unilaterally activate by

proclaiming a National Emergency, and we suggest that maintaining these boundaries will produce the most meaningful result.

Statutory powers that can be exercised during a National Emergency proclaimed by the Congress or during a war in which the United States is engaged necessarily require express prior action by the Congress. Inclusion of such powers in this study would impose a very heavy review burden upon the departments and agencies, particularly the Department of Defense and defense-related agencies. Such a study would entail, at a minimum, an in-depth examination of titles 10, 14, 22, 32, 40, 42, 50, and 50, Appendix, of the United States Code. We find no compelling reason for inclusion of these statutes.

We also reiterate our recommendation that the Committee exclude from its study provisions authorizing the President to take extraordinary steps to cope with specific domestic emergencies. Among others, these include sections 331, 332, 333, and 334 of Title 10 of the United States Code (relating to the use of troops to quell domestic disorders); section 206 of the Taft-Hartley Act (relating to injunctions to halt strikes affecting the National health and safety); and 19 U.S.C. 1862 (relating to investigations of imports affecting the National Security).

Finally, we would like to comment specifically on two statutory provisions that are effective during National Emergencies proclaimed by the President. They are (1) Section 673 of Title 10 of the United States Code, which authorizes the President to call to active duty a limited number of members of the Ready Reserve, and (2) the Trading With the Enemy Act, particularly section 5b (12 U.S.C. 95, 95a, and 50 U.S.C. 3-40). We recommend that these statutory provisions remain undisturbed. The President must have authority to activate a limited number of members of the Ready Reserve to meet any unexpected crisis that may face the Nation. Similarly, the authority conferred by the Trading With the Enemy Act must be continued, because the Treasury Department's regulations governing international transactions are dependent upon the existence of that authority. The Department of Defense and the Treasury Department will, we believe, discuss the importance of these provisions in their responses to you.

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The departments and agencies will quite likely identify additional provisions which are important to maintain in their present form. Consequently, our comments on the above two provisions should not be construed as suggesting that there is less need for retaining statutory authority conferred by other provisions of law.

Sincerely,

(Signed), Stanley Ebner

Stanley Ebner
General Counsel

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ROUTE SLIP

TO Mr. John Maury

Take necessary action ☐

Appraisal or signature ☐

Comment ☐

Prepare reply ☐

Discuss with me ☐

For your information ☐

See remarks below ☐

FROM George R. Gilbert, OMB/LRD DATE 11-2-73

REMARKS

For your information. If you have any questions, please feel free to call me on 103 x4710.

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Copy of this memo sent to OGC [REDACTED]
along with September 1973 Committee Print on
this Special Committee.

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